No. 78-1504

In the Supreme Court of the United States

OCTOBER TERM, 1978

HERMINIO CRUZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN VOORHEES
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979. A petition for a writ of certiorari was filed on April 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars a conspiracy prosecution following a conviction for a substantive offense committed during the same time period and involving related conduct.

2. Whether petitioner's successive prosecutions for possession of heroin and conspiracy to distribute a different lot of heroin entitled petitioner to reversal of his conviction under the "dual prosecution" policy of the Department of Justice.

STATEMENT

The evidence at trial is set forth in the opinion of the court of appeals (Pet. App. 2a-4a). It showed that in December 1976, in a long-distance conversation between Massachusetts and Illinois, Jose DeLeon of Chicago offered to sell a kilogram of heroin to Rafael Kercado-Rivera of Springfield, Massachusetts.[1] On December 16, 1976, Daisy Gonzales, Kercado-Rivera's courier, flew from Hartford, Connecticut, to Chicago. She met Kercado-Rivera at a restaurant in Chicago and went with him to a residence on Belden Street in that city. Minutes later, DEA agents saw DeLeon travel from the Belden Street house to petitioner's house on West Hadden Street with a brown paper bag. DeLeon subsequently returned to the Belden Street house with a white paper bag. Gonzales and Kercado-Rivera then returned to Massachusetts, where they were arrested, searched, and found to be in possession of one kilogram of heroin and a white paper bag displaying a Chicago address. This information was relayed to DEA agents in Chicago, who promptly obtained a warrant to search petitioner's house on West Hadden Street. They executed the warrant that evening and found 3.8 kilograms of heroin in the house

[1]The conversation was overheard by Drug Enforcement Administration agents, who intercepted the communication pursuant to an electronic surveillance order entered by the United States District Court for the District of Massachusetts (Pet. App. 2a-3a).

(Pet. 5, n. 2).[2] They also found drug related paraphernalia, a brown paper bag, and $29,000 in cash wrapped in Massachusetts bank wrappers.

In February 1977, petitioner was indicted by a grand jury in Chicago for possession with intent to distribute heroin found in his house, in violation of 21 U.S.C. 841(a)(1) (Pet. 5 n.2). In June 1977, petitioner and eight others (including Gonzales, Kercado-Rivera, and DeLeon) were indicted by a grand jury in Springfield, Massachusetts, for conspiracy to distribute the kilogram of heroin that was seized from Kercado-Rivera and Gonzales. Petitioner was tried and convicted on the Chicago indictment in December 1977, and sentenced to a term of 15 years' imprisonment (Pet. App. 1a-2a).[3] On January 5, 1978, the district court in Springfield denied petitioner's motion to dismiss the second indictment on double jeopardy grounds, and the court of appeals affirmed. 568 F. 2d 781.

On January 11, 1978, the district court in Springfield granted petitioner's motion for a severance and his request for a non-jury trial. Petitioner offered to stipulate that the record of the Chicago trial would stand as the evidence against him in the Massachusetts case, and he informed the court that he would not present any evidence in his defense (Pet. App. 31a-33a; App. 270).

[2]The court of appeals erroneously stated (Pet. App. 4a) that five kilograms of heroin were found in petitioner's house.

[3]This conviction is currently pending on appeal in the United States Court of Appeals for the Seventh Circuit (Pet. 4 n.1).

Additionally, the government and petitioner agreed that if the court found him guilty, the government would recommend a 15-year sentence to run concurrently with the sentence imposed by the district court in Chicago (Pet. App. 32a; App. 271).[4]

At petitioner's bench trial in March 1978, the evidence consisted of the record of petitioner's previous Chicago trial and transcripts of electronically intercepted telephone conversations between various co-conspirators. The court found petitioner guilty on the conspiracy charge and sentenced him to a term of 15 years' imprisonment and three years' special parole, to be served concurrently with the sentence imposed by the district court in Chicago. The court of appeals affirmed (Pet. App. 1a-15a),[5] With respect to petitioner's renewed double jeopardy claim, the court of appeals relied on its earlier opinion issued in January 1978 (Pet. App. 2a n.2).[6]

ARGUMENT

1. Petitioner contends (Pet. 13-27) that the Double Jeopardy Clause prohibits his prosecution in Massachusetts for conspiracy to distribute one kilogram of heroin following his conviction in Illinois for possession of the other 3.8 kilograms of heroin.

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[4]"App." refers to petitioner's appendix in the court of appeals.

[5]Prior to trial all of petitioner's co-defendants pleaded guilty to one count of conspiracy.

[6]On March 16, 1979, the court of appeals denied petitioner's motion to stay its mandate. On March 23, 1979, petitioner filed an application for bail (App. 840) in this Court. On April 2, 1978, Mr. Justice Brennan denied the application in light of the government's representation that it would not seek petitioner's surrender to commence service of his sentence unless and until the government determined that no "*Petite* confession" would be made in the case.

In *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977), this Court made clear that the Double Jeopardy Clause prohibits successive prosecutions only for the "same offense". Two separate acts that are alleged to violate two statutory provisions are not the "same offense" if the acts are not part of the "same act or transaction" or if "each [statutory provision] requires proof of an additional fact which the other does not * * *" (432 U.S. at 166, quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)). Petitioner's claim passes neither of these tests.

First, the Illinois indictment charged conduct that was quite separate and distinct from the conduct that was charged in the Massachusetts indictments. See Pet. App. 17a-22a. The Illinois indictment charged petitioner with possession of 3.8 kilograms of heroin found in his house upon execution of the search warrant, and made no reference to the one kilogram that was transported to Massachusetts (Pet. 5 n.2). The Massachusetts indictment, on the other hand, charged petitioner and his eight co-conspirators with conspiracy to distribute the single kilogram of heroin that was transported to Massachusetts and made no reference to the heroin found in petitioner's house (Pet. App. 17a-22a). Although both lots of heroin had apparently been at one time part of petitioner's extensive supply, petitioner's possession of the quantity of heroin found in his house was quite separate and distinct from the earlier delivery of a different kilogram of heroin to Kercado-Rivera and Gonzales.

Second, even if the acts charged in the two indictments could be viewed as part of the same course of conduct, they do not constitute the same offense under the *Blockburger* test, because the offense of possession with intent to distribute and the offense of conspiracy to distribute each requires proof of facts that the other does not. The first requires proof of possession but does not

require proof of any agreement; the second requires proof of an agreement but does not require proof of possession. Accordingly, as this Court has specifically held, the Double Jeopardy Clause does not bar separate prosecutions for conspiracy and for a related substantive offense. *Iannelli* v. *United States*, 420 U.S. 770 (1975); *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Bayer*, 331 U.S. 532 (1947); see 568 F. 2d at 782.

Petitioner's reliance (Pet. 15) on *Jeffers* v. *United States*, 432 U.S. 137 (1977), is misplaced. In *Jeffers* the Court assumed, without deciding, that the conspiracy offense of 21 U.S.C. 846 and the offense of conducting a continuing criminal enterprise in violation of 21 U.S.C. 848 both required the element of agreement, which would make Section 846(a) a lesser-included offense of Section 848. That issue has no bearing on the relationship between Section 846 and Section 841(a)(1). The latter two sections plainly describe different offenses, since Section 846 requires proof of an agreement that Section 841(a)(1) does not, while Section 841(a)(1) requires proof of acts that Section 846 does not. See *United States* v. *Bayer*, *supra*.[7] Contrary to petitioner's apparent contention (Pet. 13-15), nothing in *Jeffers* indicates that a conspiracy in

[7]Contrary to petitioners' claim (Pet. 13), *Jeffers* did not overrule *Bayer*, and nothing in the opinion below or in the earlier opinion of the court of appeals suggests a conflict between *Jeffers* and *Bayer*.

violation of Section 846 would be a lesser included offense of the substantive offense of possession with intent to distribute under Section 841(a)(1).[8]

2. Petitioner also contends (Pet. 27-29) that his conviction must be reversed because the government did not obtain authorization to proceed with the Massachusetts trial after petitioner had been tried in Chicago.

The Department of Justice has a policy, noted in *Petite* v. *United States*, 361 U.S. 529, 530 (1960), against successive prosecution of several offenses arising out of the same transaction unless there are compelling reasons and specific authorization of the Attorney General has been obtained. This policy is based on "considerations of fairness to defendants and of efficient and orderly law enforcement." *Rinaldi* v. *United States*, 434 U.S. 22, 24-25 and n.5 (1977); *Petite* v. *United States*, *supra*, 361 U.S. at 530. In cases in which a prosecution has been initiated without prior approval, and it is subsequently determined that the prosecution was not jusitified by compelling reasons, the Department has in the past sought dismissal of the indictment. See, *e.g.*, *Rinaldi* v. *United States*,

[8]Petitioner also relies (Pet. 16-17) on the view expressed by Mr. Justice Brennan, whom Mr. Justice Marshall joined, concurring in *Brown* v. *Ohio*, *supra*, 432 U.S. at 170, that "the Double Jeopardy Clause * * * requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of 'all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction.' *Ashe* v. *Swenson*, 397 U.S. 436, 453-454, and n.7 (1970) (Brennan, J. concurring)." This view of the Double Jeopardy Clause, however, has never been accepted by the Court (see *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 and n.6) and would not in any event, we believe, preclude successive prosecutions on the facts of this case.

supra; Hammons v. *United States*, vacated and remanded, No. 77-6536 (Oct. 2, 1978); *Frakes* v. *United States*, 563 F. 2d 803 (6th Cir.), vacated and remanded, 435 U.S. 911 (1978). However, when it has been determined that a prosecution intitiated without prior authorization is nonetheless justified by compelling reasons, it has been the practice of the Department to authorize the prosecution *nunc pro tunc*. See *Woodall* v. *United States*, cert. denied, No. 78-5812 (Apr. 2, 1979); *Welch* v. *United States*, cert denied, No. 77-6684 (Oct. 2, 1978); *United States* v. *Malizia*, 573 F. 2d 1298 (2d Cir.), cert. denied, 435 U.S. 969 (1978).

In petitioner's case, no formal prior authorization was obtained from the Assistant Attorney General prior to the trial. We view it as a close question whether the dual prosecution policy is applicable to the circumstances of petitioner's cases; in any event, when the matter was called to the Department's attention by petitioner's stay application and certiorari petition, it was determined that the Massachusetts conspiracy prosecution should be authorized *nunc pro tunc*, and the Assistant Attorney General has done so.[9].

The wisdom of that decision is not an appropriate subject of review by this Court, and petitioner is entitled to no relief under the *Petite* policy. It is well settled that the policy confers no enforceable rights upon a defendant in a criminal case, and no appellate court has ever reversed a criminal conviction over the Department's objections on the ground of failure to follow the *Petite* policy. Rather, it

[9]We note that venue for the possession charge lay only in Chicago. While the conspiracy charge could also have been brought there, the majority of the co-conspirators resided in Massachusetts, and it would have been burdensome to them to require them to stand trial in Chicago.

has been recognized that the policy involves the exercise of prosecutorial discretion in determining whether "to initiate, or to withhold, prosecution for federal crimes." *Rinaldi* v. *United States*, *supra*, 434 U.S. at 27. See *United States* v. *Thompson*, 579 F. 2d 1184 (10th Cir.) (en banc), cert. denied, No. 78-5087 (Oct. 10, 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN VOORHEES
Attorney

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